

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
USAC Request for Guidance on Contribution)	
Obligations for Text Messaging Revenues)	

To: The Chief, Wireline Competition Bureau

REPLY COMMENTS OF VERIZON WIRELESS

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SUMMARY

Text messaging is an information service and thus is not subject to mandatory contribution obligations under the statute. The initial comments in this proceeding clearly show that text messaging involves protocol conversion as well as information storage, and thus is an information service, virtually identical to email. Comments to the contrary misunderstand or ignore significant elements of text messaging service. The comments also demonstrate that text messaging is not a commercial mobile radio (“CMRS”) service, and thus cannot be subject to contribution obligations under existing rules.

The record also establishes that any decision to require contributions based on text messaging revenues could come only in a rulemaking conducted by the full Commission, and thus would have solely prospective effect. Text messaging providers’ contribution obligation is a novel question that the Commission has not addressed. Proponents of requiring text messaging contributions make several public interest arguments, but those arguments are not relevant to the simple classification question under the statute. They might be relevant to an inquiry under the Commission’s permissive authority, but such authority could only be exercised in a prospective rulemaking proceeding.

In any event, the public interest would not be served by requiring contributions based on text messaging revenues. Mobile consumers are already too heavily taxed. Some parties argue that text messaging should contribute because it is a substitute for voice calling, but even if that were true, there are many information services that are substitutes for voice calling that do not contribute today, including email, instant messaging, and social networking sites.

Finally, if the Commission nonetheless determines (though it should not) that text messaging should be classified as a telecommunications service, it should apply its decision only prospectively because retroactive application would cause manifest injustice.

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Verizon Wireless replies to the initial comments filed in response to the Bureau’s public notice seeking comment on the Universal Service Administrative Company’s (“USAC”) request for clarification regarding the universal service reporting and contribution obligations for revenues from text messaging services.¹

I. THE RECORD DEMONSTRATES THAT TEXT MESSAGING IS AN INFORMATION SERVICE.

A. Text Messaging Provides Protocol Conversion.

Comments from providers of text messaging services, who are most familiar with the functioning of the product, make clear that text messaging provides protocol conversion – which the Commission has long recognized as a characteristic of an information service.² As those

¹ *Wireline Competition Bureau Seeks Comment on Request for Guidance Filed by the Universal Service Administrative Company*, WC Docket No. 06-122, Public Notice, DA 11-853 (rel. May 9, 2011) (the “Public Notice”). Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, WCB, FCC, WC Docket No. 06-122 (filed Apr. 26, 2011) (the “USAC Letter”). Unless otherwise specifically noted, references herein to parties’ comments refer to comments filed in the above-captioned dockets on or about June 6, 2011.

² See AT&T comments at 4; CTIA comments at 10-11; T-Mobile comments at 4-6; Verizon Wireless comments at 6-8.

comments explain, text messaging providers convert messages among protocols including short message peer-to-peer protocol (“SMPP”), MM7 (a media message format), simple mail transfer protocol (“SMTP”), and transmission control protocol/Internet protocol (“TCP/IP”).³

Public Knowledge/National Hispanic Media Coalition (“PK/NHMC”) and NTCA are simply incorrect in stating that “there is nothing transformative about text messages”⁴ or that short messaging “does not typically involve a change in the protocol of the message on an end-to-end basis.”⁵ PK/NHMC and NTCA either misapprehend or choose to ignore the protocol conversion functions that are integral to text messaging, as shown in the other comments in the record. Without protocol conversion, text messaging service would have significantly less functionality than consumers have now come to expect. For example, customers of CDMA providers and customers of GSM providers would be unable to send text messages to one another, and customers would be unable to interact via text messages with Internet email or instant messaging platforms.

In addition to being wrong about the technical facts, NTCA is also wrong about the law in asserting that, even if *some* text messages involve protocol conversion, the inclusion of the protocol conversion functionality “does not render *every* text message or the fundamental service provided to the customer ‘enhanced’ in nature.”⁶ In fact, as T-Mobile points out, the “Commission has held that a service involving both transmission and processing will be deemed

³ T-Mobile comments at 4-5.

⁴ PK/NHMC comments at 5. *See also id.* at 14 (“The network does not add any formatting, or changes to the message; it simply delivers the data to the passive recipient.”).

⁵ NTCA comments at 3. *See also id.* at 4 (“There is no change in the format in which such messages are sent or received.”).

⁶ NTCA comments at 3 n.7 (emphasis in original).

an information service *in its entirety* if it is offered to the subscriber as a ‘single, integrated service.’”⁷ This is consistent with the statutory definition of an information service, which encompasses any “offering of a *capability for ... processing ... information via telecommunications.*”⁸

Text messaging service provides protocol conversion, and this functionality alone makes text messaging an information service.⁹

B. Text Messaging Permits Interaction With Stored Information.

The record also clearly demonstrates that text messaging provides customers with the ability to interact with stored information, another hallmark of an information service.¹⁰ As providers make clear, customers can use text messaging service to interact with stored information to obtain sports scores, stock quotes, and other data.¹¹ This capability, too, makes text messaging an information service.

C. Text Messaging Provides Information Storage.

The record also shows that the provision of text messaging service involves the storage of messages, a fundamental characteristic of an information service.¹² Specifically, the Short Message Service Center (“SMSC”) stores all messages both before and after delivery. Messages

⁷ T-Mobile comments at 9 (emphasis in original).

⁸ 47 U.S.C. § 153(20) (emphasis added).

⁹ See, e.g., *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7459 ¶ 4 (2004) (“services that result in a protocol conversion are enhanced services”).

¹⁰ AT&T comments at 3-4; CTIA comments at 12-13; T-Mobile comments at 8; Verizon Wireless comments at 5-6.

¹¹ *Id.*

¹² AT&T comments at 2-3; CTIA comments at 9-10; Sprint comments at 2-3; T-Mobile comments at 6-7; Verizon Wireless comments at 3-5.

that cannot be delivered immediately are stored at the SMSC until they can be delivered, and the network queries the recipient device periodically to determine its availability to receive the message.¹³ In addition, even after delivery, messages are stored for some period of time at the SMSC,¹⁴ as well as on users' handsets.¹⁵ Thus, PK/NHMC is wrong in asserting that a text message "is not sent to the SMSC for storage."¹⁶

PK/NHMC attempts to argue that email involves lengthier and more robust storage capabilities than text messaging,¹⁷ but a service need not offer storage capabilities identical to email in order to qualify as an information service. NTCA is similarly incorrect in asserting that text messaging's storage functionality is "not an enhanced feature, but rather a network management tool to accommodate phones that may be unable to receive text messages at a given time."¹⁸ In fact, text messaging service permits the storage of messages on the network for lengthy periods of time – up to several days¹⁹ – and not just "momentarily."²⁰ Messages stored on the handset can be retrieved indefinitely by the user, who can also forward, edit or reply to

¹³ See, e.g., AT&T comments at 2; T-Mobile comments at 7; Verizon Wireless comments at 4.

¹⁴ Verizon Wireless comments at 4.

¹⁵ AT&T comments at 2; CTIA comments at 10; Verizon Wireless comments at 4.

¹⁶ PK/NHMC comments at 11.

¹⁷ PK/NHMC comments at 11-12.

¹⁸ NTCA comments at 3.

¹⁹ AT&T comments at 2; CTIA comments at 10; Verizon Wireless comments at 4.

²⁰ PK/NHMC comments at 11.

them. This significant information storage capability meets the statutory test for an information service.²¹

D. Text Messaging Is Not CMRS.

The initial comments also include ample evidence that text messaging service is not subject to contribution obligations as CMRS. In order to be CMRS, a service must be a telecommunications service.²² Because, as discussed above, text messaging is an information service, it cannot be CMRS.²³

Text messaging also falls outside the CMRS category because it is not interconnected. As commenters make clear, it is not possible to send text messages to wireline telephones absent further conversion to transform the text message into something entirely different – a voice message.²⁴ Thus, PK/NHMC is again wrong in asserting that there is “no indication” that text messaging fails to meet the statutory test for CMRS.²⁵ In fact, text messaging is not CMRS.

²¹ 47 U.S.C. § 153(20). Even if the Commission were to conclude that these information storage capabilities do not in and of themselves qualify text messaging as an “information service,” text messaging would still qualify as an information service because it provides protocol conversion, interaction with stored information, or both. *See supra* Sections I.A.-B.

²² CTIA comments at 14; T-Mobile comments at 12; Verizon Wireless comments at 9.

²³ *See supra* Sections I.A.-I.C.

²⁴ It appears that only Sprint has integrated this capability into its text messaging service offering. Sprint comments at 3; *see also* PK/NHMC comments at 10 n.29. Other carriers, by contrast, only offer this capability as a separate service with a separate charge. *See, e.g.,* T-Mobile comments at 20-21; Verizon Wireless comments at 21. To the extent that different providers’ text messaging services offer different capabilities, they would have to be analyzed separately for regulatory purposes.

²⁵ PK/NHMC comments at 7.

As Verizon Wireless noted in its initial comments, the Commission's 2007 *Automatic Roaming Order* did not conclude otherwise.²⁶ The Commission did not find that text messaging is an interconnected service, but rather is an "interconnected feature[] or service[]" in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers."²⁷ The order neither classified text messaging as CMRS nor otherwise found it was a common carrier service.²⁸ PK/NHMC is incorrect to assert otherwise.²⁹

In sum, text messaging is not CMRS, and prior Commission decisions imposing contribution obligations on CMRS revenues do not apply.

II. EVEN PROPONENTS OF REQUIRING TEXT MESSAGING CONTRIBUTIONS CONCEDE THAT A FULL COMMISSION RULEMAKING WOULD BE NECESSARY TO DO SO.

As discussed above, text messaging is an information service,³⁰ as a result, it is not subject to mandatory contribution obligations under section 254.³¹ Therefore, text messaging providers could be required to contribute only via a full Commission rulemaking proceeding under its permissive authority, which would have solely prospective effect.

²⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15837 (2007).

²⁷ *Id.*

²⁸ *See id.*

²⁹ PK/NHMC comments at 4-5.

³⁰ *See supra* Section I.

³¹ 47 C.F.R. § 254(d).

A. Commenters Acknowledge That the Classification of Text Messaging is Novel and Not Addressed by Existing Rules.

The record leaves no doubt that the regulatory classification of text messaging is a novel question not addressed by current rules. The Commission has specifically acknowledged that it has not addressed the regulatory classification of text messaging service.³² As even PK/NHMC acknowledge, at present, “text messaging remains unclassified.”³³

Because the Bureau’s delegated authority does not extend to “novel questions of fact, law, or policy,”³⁴ the Bureau lacks authority to determine the regulatory classification of text messaging service.³⁵ Moreover, because the issue is not addressed by current rules, any decision to impose a contribution obligation would have solely prospective effect.³⁶

B. The Public Interest Would Be Relevant Only in a Rulemaking to Exercise Permissive Authority.

Various parties take positions as to whether the public interest would be served by imposing contribution obligations on text messaging.³⁷ This question is, however, only relevant in the context of a prospective rulemaking proceeding.

Neither the definition of “information service” nor the definition of “telecommunications service” mentions the public interest.³⁸ And, as PK/NHMC concedes, the classification of text

³² See, e.g., CTIA comments at 18; Verizon Wireless comments at 14-16.

³³ PK/NHMC comments at 3.

³⁴ 47 C.F.R. § 0.291(a)(2).

³⁵ Verizon Wireless comments at 14-16.

³⁶ *Id.*

³⁷ See *infra* Section III.

³⁸ 47 U.S.C. §§ 153(20), 153(46).

messaging “must be judged according to its adherence to [the] statutory definition.”³⁹ Thus, even if the Bureau had the authority to address the regulatory classification of text messaging, which it does not,⁴⁰ public interest considerations would not be among the criteria.

Although Verizon Wireless does not believe that the public interest would be served by imposing contribution obligations on text messaging revenues,⁴¹ public interest considerations would be relevant if the Commission sought to exercise its permissive authority to impose contribution obligations on text messaging providers.⁴² The record makes clear, however, that the Commission’s permissive authority may only be exercised by the full Commission acting in the context of a prospective, notice-and-comment rulemaking proceeding, and not by the Bureau in a response to a USAC inquiry.⁴³

III. THE PUBLIC INTEREST WOULD NOT BE SERVED BY IMPOSING UNIVERSAL SERVICE CONTRIBUTIONS ON TEXT MESSAGING REVENUES.

The public interest would be disserved by imposing universal service contribution obligations on text messaging revenues. As CTIA points out, consumers have benefitted from the unregulated environment in which text messaging (and other innovative and useful services) have flourished.⁴⁴ Studies show that the current taxes and fees on wireless services account for

³⁹ PK/NHMC comments at 7-8.

⁴⁰ *See supra* Section II.A.

⁴¹ *See infra* Section III.

⁴² *See, e.g.*, CTIA comments at 20-21 (arguing against exercise of permissive authority); NTCA comments at 7-8 (arguing for exercise of ancillary authority).

⁴³ AT&T comments at 5-6; CTIA comments at 20-21; Sprint comments at 4-5; USTelecom comments at 2-3; Verizon Wireless comments at 11-14.

⁴⁴ CTIA comments at 21-22.

over 16 percent of an average wireless consumer's monthly bill, and even exceed 20 percent in some states.⁴⁵ Wireless taxes are currently double or triple the rate of taxes imposed on other goods and services.⁴⁶ It would violate the public interest to impose even greater burdens on this useful service that consumers value so highly. This is particularly true given that text messaging services can serve as “gateway” services that introduce consumers to the benefits of digital communication and ultimately lead to increased broadband adoption.

PK/NHMC argues that text messaging and voice telecommunications are “in many ways interchangeable” and that it is “nonsensical” from a consumer perspective to regulate them differently.⁴⁷ Similarly, NTCA argues that leaving text messaging revenues free of contribution obligations “would create artificial incentives for consumers to ‘text’ one another in lieu of placing voice calls.” But these arguments implicate issues that are far broader than the narrow issue raised by USAC’s letter. Consumers today have myriad options in lieu of making a voice call, including:

- sending an email message;
- initiating an instant messaging (“IM”) exchange;
- sending an individual message on a social networking site such as Facebook; or
- posting a message on a broadcast social network such as Twitter.

Whatever minor similarity text messaging might bear to voice calling, it bears far greater similarity to these other communications options – none of which the Commission has subjected to contribution obligations. In addition, recent data show that other Internet-based applications

⁴⁵ Scott Mackey, *A Growing Burden: Taxes and Fees on Wireless Service*, Tax Analyst - State Tax Notes, 475 (Feb. 14, 2011).

⁴⁶ *Id.* at 476-78.

⁴⁷ PK/HNMC comments at 5-6.

already are beginning to erode wireless providers' text messaging revenues.⁴⁸ Before the Commission could determine that text messaging should be subject to contribution obligations, it would have to explain why the public interest would be served by singling text messaging out for this burden, while other, virtually identical communications choices are not currently subject to the same requirement.

The record in short does not support a finding that the public interest would be served by imposing contribution obligations on text messaging revenues.

IV. IN ANY EVENT, REQUIRING RETROACTIVE CONTRIBUTIONS WOULD CAUSE MANIFEST INJUSTICE AND WOULD THUS BE UNLAWFUL.

As is undisputed in the record of this proceeding, any decision to apply universal service contribution obligations to text messaging revenues would represent a new legislative rule that would necessarily have solely prospective effect.⁴⁹ Even if the Commission somehow concluded it could respond to the USAC Letter in an “adjudicatory” decision, however, it cannot apply its decision retroactively because to do so would cause manifest injustice.⁵⁰

The determination of whether retroactive application of an adjudicatory decision would cause manifest injustice is ultimately a question of “equity and fairness.”⁵¹ In an analogous situation, the Commission determined that it would cause manifest injustice to require the re-

⁴⁸ “Carriers Sweat as Texting Cools Off: New Messaging Apps from Apple, Others May Hit Fees,” *Wall Street Journal*, June 9, 2011 (available at <http://tinyurl.com/6cxumea>).

⁴⁹ See, e.g., Verizon Wireless comments at 12, citing *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2004).

⁵⁰ *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (“*AT&T*”) (“For our part we have drawn a distinction between agency decisions that substitute new law for old law that was reasonably clear and those which are merely new applications of existing law, clarifications, and additions. The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to “manifest injustice.”) (internal citations and quotations omitted).

⁵¹ *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001) (“*Verizon*”).

computation of universal service contributions for several prior years because of the difficulties it would create for contributors and USAC.⁵² The Commission observed that applying the ruling retroactively would require refunds to some contributors and additional contributions from others, and it would be impossible, years later, to provide refunds to the same filers that had made the contributions – let alone their customers – and inequitable to require the current customers of other filers to make up contributions that ought to have been passed on to prior customers of their current providers.⁵³

The same problems are presented here. Consumers have purchased significant amounts of text messaging from wireless providers for many years. If those revenues were assessed retroactively, providers as a practical matter would be unable to pass through these old universal service charges to customers. Many such customers have long since changed providers or no longer exist. Even those customers who still remain with the same provider would understandably refuse to pay new fees for old services. Thus, giving retrospective effect to any new requirement would significantly penalize many text messaging providers because they would be unable to recover contributions from customers.

Moreover, reaching back in time would be nearly impossible. Industry-wide, billions of dollars of annual revenues are associated with text messaging; assessing text messaging would expand the contribution base, but the contribution factor would also have to be lowered as a result. Thus, for every provider offering text messaging, the Commission or USAC would have to determine the difference, if any, between what the contributor paid into the fund based on the

⁵² *Federal-State Joint Board on Universal Service, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation et al.*, CC Docket Nos. 96-45 and 96-262, WC Docket No. 06-122, Order on Reconsideration, 23 FCC Rcd 6221 (2008) (“*BellSouth*”).

⁵³ *Id.* at 6227-28 ¶¶ 16-19.

contribution factor at the time and what the contributor would have paid based on a lower contribution factor but a larger base of assessable revenue. Especially for larger contributors with billions of dollars in reportable revenues, it is highly unlikely that this process could be administered in a reliable way for prior periods, and the resources required for both the contributor and USAC or the Commission would be enormous in any event. And for any one contributor, it is not at all clear that the amount of USF contributions would be materially different even if it were possible to engage in such a massive restatement of revenues for prior periods.

Even if there were significant differences in provider contributions, the Commission could not undo the past. If the Commission sought to implement any new contribution decision regarding these services retrospectively, to be fair to consumers who pay for the USF through charges on their bills the Commission would have to re-engineer quarterly contribution factors as if the revenues from text messaging had been in the assessable base. That in turn would lower the contribution factor for prior periods and the amount of universal service charges that should have been passed through to customers without text messaging plans. Contributors would then have to flow years worth of refunds through to tens of millions of customers (or more) that may have changed providers, moved, died, merged, or went bankrupt in the interim. As an administrative matter, attempting to unscramble the eggs in this manner would be impossible, and thus retroactive application would be manifestly unjust.⁵⁴

Giving retrospective effect to any new requirement that text messaging providers contribute to universal service also would violate the statutory principle that universal service

⁵⁴ The instant case is analogous to the *BellSouth* case in another significant respect. There, as here, the case did not “pit one group of carriers against another,” as had other cases involving, for example, liability for payment of access charges. *Id.* at 6227 ¶ 15, citing *Verizon, supra*, and *Qwest Serv. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007).

policies should be “predictable.”⁵⁵ Predictability is critical because it allows carriers a fair opportunity to recoup universal service contributions from end users at the time the carrier must contribute for revenues obtained from those users. Here, retrospective effect would violate the predictability principle because many providers of text messaging reasonably treated such services as exempt from USF contributions.⁵⁶ Therefore, these providers did not pass through USF charges to consumers, which is standard industry practice for other services. For the Commission suddenly to *expand* the scope of assessable services and apply any new requirement retroactively would create extreme unpredictability.

The instant case is also similar to *InterCall*, where the Commission reversed a USAC determination to apply retroactively its classification of so-called “stand-alone” audio conferencing services as a telecommunications services.⁵⁷ The Commission approved USAC’s decision that audio bridging was assessable on a “going forward basis,” but reversed USAC’s attempt to require contributions for past periods, on the ground that it was “unclear to InterCall, as well as to the industry, that stand-alone providers of audio-bridging services have a direct USF contribution obligation.”⁵⁸ The Commission also pointed to the lack of prior enforcement action

⁵⁵ 47 U.S.C. § 254(b)(5). *See also BellSouth*, 23 FCC Rcd at 6229 n.61 (considering violation of section 254(b) principles in manifest injustice determination).

⁵⁶ *See* USAC Letter at 2 (“The 2008 FCC Form 499-A Instructions appear to support classifying text messaging as either an information service, not subject to USF contribution, or a telecommunications service, which is subject to USF contribution.”).

⁵⁷ *See Request for Review by InterCall, Inc. of Decision of Universal Serv. Administrator*, 23 FCC Rcd 10731 (2008).

⁵⁸ *Id.* at 10738–39 ¶¶ 23–24.

or other actions by the Commission to clarify the status of audio bridging services.⁵⁹ The same considerations, as well as the others set forth above, apply with equal or greater force here.

In sum, the Commission could not classify text messaging as an information service in an “adjudicatory” proceeding in response to USAC’s letter. If it nevertheless attempted to do so, however, it must not apply its conclusion retroactively, to avoid manifest injustice.

CONCLUSION

Text messaging should be classified as an information service; no other decision would be consistent with the Act. Should the Commission determine to begin a proceeding to consider whether to exercise its permissive authority to impose USF contribution obligations on text messaging (which it should not do), it could do so only pursuant to a rulemaking which would have prospective effect.

Respectfully submitted,

VERIZON WIRELESS

By:

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a horizontal line underneath the name.

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⁵⁹ *Id.* at 10738 ¶ 23 (“Further, as InterCall notes, actions (or the lack thereof) in certain Commission proceedings may have contributed to the industry’s unclear understanding of stand-alone audio bridging providers’ direct contribution obligation.”).